IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROSLYN G. AUSTIN,	)	
	)	
Plaintiff,	)	
	)	No. 98 C 8085
vs.	)	
	)	Magistrate Judge Schenkier
COLE TAYLOR BANK, an Illinois Corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On June 18, 1998, the defendant, Cole Taylor Bank ("defendant"), terminated the employment of the plaintiff, Roslyn G. Austin ("plaintiff"), an African-American woman who had been employed as a head teller. On July 9, 1998, the plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that plaintiff's supervisor – an African-American of Jamaican ancestry – terminated plaintiff based on her United States national origin. The EEOC dismissed plaintiff's charge and notified her of her right to sue on September 22, 1998. In a one count complaint filed in this Court on December 1, 1998, the plaintiff alleged that she was terminated on the basis of her national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, as amended. The defendant has filed a motion for summary judgment, (doc. # 14-1) which the Court now grants.[1]

[1]By the parties' consent, on March 27, 2000, this case was reassigned to this Court, pursuant to 28 U.S.C. § 636(c)(1) and Northern District of Illinois Local Rule 73.1(b), for this Court to conduct any and all proceedings in this case, and to enter final judgment (doc. #s 9-1, 10-1, 11-1).

I.

Summary judgment is proper if the record shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a mater of law. *See, e.g.*, *Lexington Ins. Co. v. Rugg & Knapp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999). In this case, the defendant has submitted a statement of undisputed, material facts pursuant to Northern District of Illinois' Local Rule 56.1 (formerly Rule 12(M)). As required, defendant's statement of material, undisputed facts includes "references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth . . ." UNITED STATES DIST. COURT, N. DIST. OF ILL. L.R. 56.1(a)(3).

Defendant's statement, if supported by the evidentiary citations (which is the case here), will be deemed admitted unless properly controverted by the opposing party. *Id*., L.R. 56.1(b)(3)(B); *see also Corder v. Lucent Technologies., Inc.*, 162 F.3d 924, 927 (7th Cir. 1998). Local Rule 56.1(b)(3) sets forth the manner in which the non-moving party, as to each fact, either must admit that the fact is undisputed or identify the evidentiary basis for any asserted fact dispute. In this case, the nonmoving party (here, the plaintiff) did not submit a timely Rule 56.1(b) statement. Moreover, the document that plaintiff belatedly sought leave to file, although labeled a Rule 56.1(b) statement, in fact failed to comply with Local Rule 56.1(b) procedurally (it did not respond to defendant's statement on a paragraph-by-paragraph basis) or substantively (it did not identify for each paragraph a basis in evidence for any asserted fact disputes). The Court therefore denied the plaintiff leave to belatedly file her purported Rule 56.1(b) statement. *Austin v. Cole Taylor Bank*, No. 98 C-8085, 2000 WL 1047216 (N.D. Ill. July 27, 2000).

Accordingly, the Court has deemed the following facts offered by defendant as admitted because the facts asserted by defendant are supported by evidence in the record, and the plaintiff has failed to properly controvert them.

A.

The plaintiff, Roslyn G. Austin, is an African-American citizen born in the United States (Def.'s Facts ¶ 1). The plaintiff was hired by Skokie Trust and Savings Bank as a teller on September 28, 1981 (Def.'s Facts ¶ 5). The defendant, Cole Taylor Bank, is an Illinois corporation that does business in Cook County, Illinois (Def.'s Facts ¶ 2). Cole Taylor acquired Skokie Trust and Savings Bank in the mid-1980's (Def.'s Facts ¶ 6). From 1981 to 1997, plaintiff held various positions at Skokie Trust and Savings Bank and Cole Taylor Bank, including teller, personal banker, and customer service representative (Def.'s Facts ¶ 7).

On April 21, 1997, the plaintiff was promoted to the position of head teller at Cole Taylor's Skokie, Illinois branch (Def.'s Facts ¶ 8). At that time, the plaintiff apparently reported to Debbie Venturella, a customer service manager (Def.'s Facts ¶ 10). On July 17, 1997, Ms. Venturella gave plaintiff a list of head teller duties (Def.'s Facts ¶ 9 and Ex. C thereto). Thereafter, On August 11, 1997, Ms. Venturella informed plaintiff in writing of specific job functions which would be reviewed with her in the following two weeks, and invited plaintiff to indicate "any other duties which you could use some training on" (Def.'s Facts ¶ 10, and Ex. D thereto). There is no evidence that plaintiff made any request for training.

B.

In or about September 1997, defendant hired Claudette Lewis, an African-American woman of Jamaican ancestry, as a customer service manager at Cole Taylor's Skokie branch (Def.'s Facts ¶ 12; Compl. and Answ. ¶ 15). The plaintiff states that she was interested in applying for the customer service manager position when defendant hired Ms. Lewis (Def.'s Facts ¶ 69), but admits that the defendant's decision to hire Ms. Lewis did not constitute discrimination (Def.'s Facts ¶¶ 67-68). Indeed, plaintiff never indicated any interest in that position until after Ms. Lewis had been hired (Def.'s Facts ¶ 69).

It appears that at about this time, plaintiff began reporting to Ms. Lewis rather than Ms. Venturella. Shortly after being hired, Ms. Lewis hired Diane Barrier to fill another head teller position at Cole Taylor's Skokie branch (Def.'s Facts ¶ 13). It is Cole Taylor Bank's policy to have two head tellers at each office (Def.'s Facts ¶ 72). The plaintiff admits that there was no discriminatory motive on the part of the defendant in having two head tellers at each office (Def.'s Facts ¶ 73).

On January 6, 1998, Ms. Lewis sent the plaintiff a memorandum stating that a significant number of the head teller duties outlined in Ms. Venturella's July 17, 1997 memorandum were not being adequately performed by plaintiff (Def.'s Facts ¶ 15 and Ex. E thereto). The January 6 memorandum stated that performance of these duties was "imperative" to insure "audit controls are in place and monitored" (*Id.*). The memorandum also informed the plaintiff that an action plan would be in place for 30 days to ensure that those head teller duties were being performed, and invited the plaintiff to identify any training that plaintiff believed she needed. *Id*. The plaintiff refused to sign the memorandum (*Id.*), or to provide a written explanation for any disagreement with it (Def.'s Facts, Ex. G).

In March 1998, Ms. Lewis implemented a development plan for plaintiff, which was to run for 90 days. That program, in conjunction with the action plan already in effect, had the stated purpose of seeking to improve the plaintiff's job performance (Def.'s Facts ¶¶ 21-22 and Ex. F. thereto). The development plan was to be reviewed every 30 days (*Id*.) The memorandum detailed specific job-related areas in which plaintiff was required to improve her performance, and the memorandum stated that absent "immediate improvement," plaintiff would be subject to "further disciplinary action up to and including termination" (*Id*.).

C.

Despite this directive, plaintiff's job performance did not improve. A memorandum dated June 18, 1998 outlined continuing deficiencies in plaintiff's job performance (Def.'s Facts, Ex. J). In particular, two items in that memorandum made reference to two different investigation reports to Ms. Lewis by the defendant's Bank Security Department, which detailed plaintiff's violations of defendant's policies (Def.'s Facts ¶¶ 27-35 and Exs. H and I thereto).

The first report, dated April 15, 1998, stated that the plaintiff admitted to violating defendant's policy by initializing and accepting questionable items for deposit at the Skokie branch (Def.'s Facts ¶¶ 27-28, 30 and Ex. H). As a result of that breach of policy, the bank was exposed to a potential loss of $23,890 (Def.'s Facts ¶ 33 and Ex. H). As a result of that breach of policy, the bank was exposed to a potential loss of $23,890 (Def.'s Facts ¶ 33 and Ex. H).

A second investigation report, issued by the Bank Security Department on June 15, 1998 (three days before plaintiff's termination), indicated that the plaintiff also violated defendant's policy in connection with another bank account (Def.'s Facts ¶ 34 and Ex. I). The report stated that on June 5, 1998, plaintiff

knowingly had allowed a customer to negotiate a $4,500 transaction when the customer lacked sufficient funds (Def.'s Facts, Ex. I.). Plaintiff admitted to the investigator that she had not performed any due diligence on a questionable deposit (Def.'s Facts ¶ 35), and that this was a direct violation of defendant's policy (Def.'s Facts ¶ 35).

In her deposition in this case, plaintiff admitted that she knowingly violated bank policy in these instances (Def.'s Facts ¶¶ 80, 82). Plaintiff further admitted that she knew that these violations of bank policies could result in her termination (Def.'s Facts ¶ 81). And, in fact, on June 18, 1998 – three days after the second investigative report – plaintiff was informed that she was being terminated "[a]s a result of your disregard for company policy and lack of significant improvement on your development plan" (Def.'s Facts ¶ 36 and Ex. J).

D.

In her deposition, the plaintiff stated her belief that these performance deficiencies were not the real reason for her discharge. Rather plaintiff testified that she believed the true and *only* reason she was terminated was because Ms. Lewis viewed the plaintiff as a threat and wanted to get rid of her (Def.'s Facts ¶¶ 63-64).[2] Plaintiff's theory was that Ms. Lewis viewed plaintiff as a threat to succeed Ms. Lewis to the customer service position, and that Ms. Lewis wanted to prevent plaintiff from replacing her as the customer service manager while Ms. Lewis was on maternity leave (Def.'s Facts ¶¶ 56, 61-62 and Ex. K, ¶ 15; Ex. L, at 42, 47). Plaintiff admits that Ms. Lewis did not make any derogatory remarks concerning

[2]In fact, the plaintiff answered "yes" in response to the questions: (1) whether plaintiff was "disciplined," "treated unfairly," and "eventually fired" based "solely on the fact that she [Ms. Lewis] saw you as a threat and wanted to get rid of you because she didn't want you to get her job," and (2) whether "that's the only reason that she treated you in the fashion that you believe was improper, correct?" (Ex. L at 47).

plaintiff's national original (Def.'s Facts ¶ 74), and that plaintiff never heard anything to indicate that Ms. Lewis was preferring others over plaintiff due to national origin (*Id*. ¶ 77).

II.

In this case, the plaintiff's sole claim is that she was discriminated against because of her American national origin in violation of Title VII. Title VII makes it unlawful for an employer to discharge an employee due to his or her national origin. 42 U.S.C. § 2000e-2(a)(1); *see also Mojica v. Gannett Co., Inc.*, 7 F.3d 552, 562 (7th Cir. 1993); *Shipley v. Dugan*, 874 F. Supp. 933, 942 n.6 (S.D. Ind. 1995). The *Shipley* court noted that claims of discrimination based upon national origin are broadly defined and do not require that the plaintiff be foreign born. *Shipley*, 874 F. Supp. at 942 n.6 (internal citation omitted); *see also Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 675 (N.D. Ill. 1984) ("employment discrimination against American citizens based merely on country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII, as well as notions of fairness and equality").

As outlined above, plaintiff has no direct evidence that she was subjected to national origin discrimination. Thus, the plaintiff relies on the indirect burden-shifting model established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), which allows a plaintiff to establish a prima facie case of national origin discrimination by offering evidence that: (1) she is a member of a protected class; (2) she was meeting her employer's legitimate expectations; (3) she suffered adverse employment action; and (4) the employer treated similarly situated employees outside the protected class more favorably. *Oates v. Discovery Zone*, 116 F.3d 1161, 1171 (7th Cir. 1997). "The requisite degree of proof necessary to establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even need to

rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

If the prima facie case is established under *McDonnell-Douglas*, then the burden is on the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996). If the employer produces a legitimate (nondiscriminatory) reason for the adverse employment action, then the plaintiff must show by a preponderance of the evidence that the employer's stated reason is "pretext for discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2106 (2000) (*citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A pretext for discrimination may be shown directly, by offering evidence that the employer's adverse decision was motivated by a discriminatory reason rather than the proffered reason, or indirectly, by offering evidence that the employer's proffered reasons are not credible. *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035,1039 (7th Cir. 1993). Throughout the burden-shifting process, the ultimate burden of persuasion on the question of intentional discrimination remains at all times with the plaintiff. *Id*.

Here, the defendant argues that the plaintiff has not met her burden of establishing a prima facie case. For the reasons discussed below, the Court finds that although there can be no real dispute that plaintiff is a member of a protected class who suffered an adverse employment action, she has failed to establish the second and fourth elements of her prima facie case, namely, that she was meeting her employer's legitimate expectations and that her employer treated similarly situated employees outside the protected class more favorably.

A.

We begin with a discussion of the two elements that plaintiff can meet for purposes of summary judgment. *First*, there can be no genuine dispute that a termination from employment is an "adverse action" sufficient to meet the third element of the *McDonnell-Douglas* test. *Second*, the defendant does not dispute plaintiff's sworn statements that she is of United States origin (Def.'s Facts ¶ 49). Rather, the defendant argues that to satisfy the "protected class" element of her prima facie case, the plaintiff must "identify any characteristics she possesses which affect her objective appearance to others" (Def.'s Mem. at 7, *citing Harel v. Rutgers*, 5 F. Supp. 2d 246, 269 (D.N.J. 1998). However, defendant's reliance on *Harel* is misplaced.

The district court in *Harel* did not hold that the "protected class" element of a national origin prima facie case *requires* identification of a plaintiff's appearance characteristics, but merely noted that the EEOC's expansive definition of "national origin" permits claims that span "the denial of equal opportunity because of an individual's, or his or her ancestor's, place of origin; *or* because an individual has the physical, cultural or linguistic characteristics of a national origin group." *Harel*, 5 F. Supp. 2d at 269 (*quoting* 20 C.F.R. § 1606.1) (emphasis added). This disjunctive definition allows for the possibility of national origin discrimination claims, even if there are no discernable characteristics associated with the particular national origin. And, here, of course, because plaintiff is of United States national origin, it would be difficult to conceive of any particular "appearance characteristic" that would define her as such, given the multitude of appearance characteristics possessed by those born in the United States. Thus, plaintiff's unrebutted sworn assertion of her origin is sufficient to at least create a triable issue on that point.

B.

However, the plaintiff has not satisfied the second element for a prima facie case of discrimination, because the undisputed facts show that she did not meet defendant's legitimate expectations for her work at the time of her termination. It is undisputed that the plaintiff intentionally and knowingly disregarded defendant's bank policy with regard to security procedures while she was a head teller. The undisputed evidence shows that independent investigations (conducted by someone other than the alleged perpetrator of the discrimination) found that plaintiff disregarded defendant's bank policy on at least two separate occasions: in March 1998, and again in June 1998. In each instance, the plaintiff approved customer transactions that violated bank policy and that exposed the bank to possible losses. In each instance, plaintiff acted despite knowing that her conduct violated bank policy, and could result in her termination.

Under *McDonnell-Douglas*, defendant's expectations are legitimate if they are bona fide. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1779 (7th Cir. 1997). There is no dispute that the bank had a bona fide expectation that its head tellers would follow bank policies rather than ignore them. Plaintiff's admitted, knowing violation of the defendant's bank policy is sufficient to show that plaintiff was not meeting the defendant's legitimate expectations for her work, and defendant could be granted summary judgment on this basis alone. But, there is more.

The undisputed, material facts show that for some five months prior to plaintiff's termination, the plaintiff was made aware of performance problems that she failed to remedy. On January 6, 1998, Ms. Lewis informed plaintiff in writing that a significant number of the plaintiff's duties were not being adequately performed (Def.'s Facts ¶¶ 14-16). That memorandum also detailed the implementation of an action plan,

or "probation" as the plaintiff states in her complaint, to ensure that the plaintiff's duties were being performed. The plaintiff refused to sign the action plan memorandum, but at the time did not offer a rebuttal to the criticisms expressed in the memorandum (Def.'s Facts ¶¶ 18, 16).

Thereafter, in March 1998, Ms. Lewis gave plaintiff a "development plan" that required the plaintiff to:

- Attend a management class to develop the plaintiff's management skills.
- Immediately begin to exude a positive attitude towards subordinates.
- Take initiative to follow up on issues when identified (*e.g.*, counsel tellers when tardy or excessively absent, discuss teller differences, etc.).
- Deal more pleasantly and courteously with customers.
- Follow security and audit procedures on a daily basis.
- Improve job knowledge and thoroughly understand all aspects of her job. The plaintiff was given the responsibility of taking steps necessary to improve her job knowledge.
- Stop all inappropriate and subordinate behavior towards Service Manager immediately.

In that development plan, Ms. Lewis specifically warned plaintiff that if immediate improvement did not occur, then the plaintiff could receive further disciplinary action "up to and including termination" (Def.'s Facts, Ex. F).

Plaintiff has offered no evidence either to contradict these criticisms, to show that these were not bona fide expectations, or to show that her performance had significantly improved by the time of her termination. To the contrary, Ms. Lewis's June 18, 1998 memorandum terminating plaintiff describes a continuation of these performance problems (Def.'s Facts, Ex. J). Specifically:

- The plaintiff did not follow up on issues with the tellers when identified, *e.g.*, tardiness, excessive absenteeism or teller differences. The plaintiff was also notified that tellers were using her override, but the plaintiff did not remedy the situation.

- The plaintiff did not follow security and audit procedures on a daily basis. In particular, the plaintiff made several exceptions when approving customer transactions that exposed Cole Taylor Bank to possible losses (these were the subject of the two separate investigative reports).

- The plaintiff did not complete the management exercises from the Human Resources department to follow up on the management class taken on March 24, 1998.

- The plaintiff did not improve her job knowledge. The plaintiff did not follow up with Nancy Grey to review Cole Taylor Bank procedure on clearing cash. The plaintiff did not clear the cash reconciliation report in a timely manner, did not verify the $3,000 logs, and did not properly schedule the staff.

- The plaintiff did not cease her insubordinate behavior towards the Service Manager. The plaintiff did not complete assignments, *e.g.*, write up teller differences and scheduling.[3]

The relevant time period to consider the plaintiff's performance is at the time of her termination. *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1262 (7th Cir. 1993). The plaintiff has offered no evidence to lead a jury to a reasonable conclusion that the plaintiff was in fact meeting defendant's legitimate expectations at the time of her termination, and thus, the second element of the prima facie case cannot be satisfied and summary judgment must be entered in favor of the defendant. For the sake of completeness, however, we address the remaining elements and issues in the case.

[3]In her complaint, plaintiff alleges she did not receive proper training. However, plaintiff offers no evidence to back up this assertion. Moreover, irrespective of the training she received, plaintiff admits she knew that she was violating bank policy when permitting the transactions that led to the two investigative reports, and that those violations could result in termination. Viewed in this light, any possible quarrel about plaintiff's training is not a material dispute that would foreclose summary judgment.

C.

The plaintiff also has failed to satisfy the fourth element for a prima facie case, by failing to show that there were similarly situated employees who were not of United States origin, and who were treated more favorably than the plaintiff. Although plaintiff argues that she believed that Diane Barrier, a head teller of Jamaican heritage, was treated more favorably than her, the plaintiff offers no evidence, direct or indirect, to raise a reasonable inference regarding defendant's allegedly more favorable treatment of Ms. Barrier based on her national origin. And, plaintiff has offered no evidence that Ms. Barrier's job performance was equal or worse than that of plaintiff (Def.'s Facts ¶ 53). The plaintiff, therefore, cannot establish the fourth element of her prima facie case, and the defendant's motion for summary judgment must be granted in this basis as well.

D.

Assuming, *arguendo*, that plaintiff had made out a prima facie case, the Court finds that plaintiff could not satisfy her "ultimate" burden of proof on the question of intentional discrimination. The Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2106 (2000), recently held that the plaintiff may establish a showing of intentional discrimination by proving that the "employer's proffered explanation is unworthy of credence." *Id*. at 2106. The *Reeves* court stated that the plaintiff "must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons," but were a pretext for discrimination. *Id*. (internal citation omitted). In this case, the plaintiff has not produced any evidence from which a

reasonable trier of fact could conclude that the defendant's reason for termination (*i.e.*, she was not performing her job in a satisfactory manner) was false.

Moreover, even if plaintiff had evidence to challenge that assertion, her claim would fail because plaintiff's theory of discrimination here is fundamentally flawed. Plaintiff admits that – in her view – she was *not* terminated because of her national origin. Rather, plaintiff claims that Ms. Lewis viewed the plaintiff as a competitive threat to her position as Customer Service Manager and wanted to get rid of plaintiff before she left on maternity leave (Def.'s Facts ¶ 62, Ex. L. at 47). Even if plaintiff had evidence to support that belief (which she has not offered), that evidence would not salvage plaintiff's claim. If Ms. Lewis fired the plaintiff to protect her own job, that might be dishonorable conduct – but it would not be discriminatory conduct that Title VII forbids. *See Cabrera and Ochoa v. Enesco Corp.*, No. 97 C 5546, 1998 WL 325169, at * 4-5 (N.D. Ill. 1998) (granting summary judgment where plaintiffs were not able to say whether they were fired because of their national origin).

IV.

Finally, we note that in opposing summary judgment, plaintiff lays great weight on the proposition that summary judgment standards should be "applied with added rigor" in discrimination cases, which involve questions of motive and credibility. *See e.g.*, *Miller v. Borden, Inc.*, 168 F.3d. 308, 312 (7th Cir. 1999). However, in *Miller*, the Seventh Circuit also explained that summary judgment "will not be defeated simply because motive or intent are involved." 168 F.3d at 312. That observation is consistent with the Seventh Circuit's previous comment that "there is not a separate rule of civil procedure governing summary judgment in employment discrimination cases." *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d

1394, 1396 (7th Cir. 1997) ("summary judgment is hardly unknown, or for that matter rare, in employment discrimination cases . . .").

What these cases teach is that on summary judgement, the issue is not simply whether the claims at issue involve motive or intent, but is instead whether there are genuine material fact disputes that require a trial on those issues. In this case, there are no such disputes; summary judgment thus is appropriate here.

CONCLUSION

For the reasons explained in this opinion, the defendant's motion for summary judgment (doc. # 14-1) is GRANTED. The Clerk of the Court is directed to ENTER FINAL JUDGMENT, pursuant to Fed. R. Civ. P. 58, in favor of defendant and against the plaintiff and to TERMINATE this case.

ENTER:

_____

SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: August 18, 2000